

No. 15891 ✓

United States
Court of Appeals
for the Ninth Circuit

BERNARD KIRSCH,

Appellant.

vs.

GEORGE BARNES, MILTON L. HUBER, G.
EDWARD GOODWIN, MILTON L. HUBER
& G. EDWARD GOODWIN, a Copartnership
Doing Business as Huber & Goodwin,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Northern Division.

FILED

MAR 12 1958

PAUL P. O'BRIEN; CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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and G. Edward Goodwin.

In the District Court of the United States for the
Northern District of California, Northern
Division

No. 36020

BERNARD KIRSCH,

Plaintiff,

vs.

GEORGE BARNES, MILTON L. HUBER, G.
EDWARD GOODWIN, MILTON L. HUBER
& G. EDWARD GOODWIN, a Copartnership,
Doing Business as HUBER & GOODWIN,

Defendants.

COMPLAINT FOR MONEY

Comes now plaintiff and for cause of action
against defendants herein alleges:

I.

At the time of the filing of the complaint herein
plaintiff was and at all times herein mentioned has
been and still is a resident of the State of New
York.

II.

At the time of the filing of the complaint herein
defendants were and at all times herein mentioned
have been citizens and residents of the State of
California, and of the Northern Division of the
Northern District thereof.

III.

This is an action by citizens of different states, viz., the plaintiff on one side and the defendants on the other side, and the amount in controversy is in excess of Ten Thousand Dollars (\$10,000.00).

IV.

Milton L. Huber and G. Edward Goodwin are now and at all times herein mentioned have been attorneys and copartners doing business as Huber & Goodwin. During several years up to and including October 16, 1952, Huber & Goodwin were the regularly retained and employed attorneys for plaintiff.

V.

Dayton C. Murray, Jr., hereinafter called Murray, was on July 26, 1951, duly appointed a Notary Public in and for the County of Humboldt, State of California, for the term of four (4) years from the date of said commission and was until the termination of said commission a duly acting and appointed Notary Public. Said Dayton G. Murray, Jr., is now and at all times herein mentioned has been an attorney at law, employed by Defendants Huber & Goodwin.

VI.

At all times mentioned herein and until the 29th day of June, 1956, plaintiff herein was the owner of certain timber located in the County of Humboldt, State of California.

VII.

On or about October 23, 1952, under the circumstances hereinafter set forth, and without the knowledge and consent of plaintiff, said Murray, in his capacity as Notary Public, wilfully and wrongfully signed and sealed a certificate of acknowledgment of the signature of plaintiff to a contract dated October 16, 1952, between plaintiff, Huber & Goodwin, a partnership, and George Barnes, and affixed said certificate to said contract. Said certificate of acknowledgment bore the date of October 16, 1952. A copy of said contract, together with said certificate of acknowledgment is attached hereto marked Exhibit "A" and made a part hereof. The timber described in said contract is the same timber as that mentioned in Paragraph III above. Plaintiff did not acknowledge his signature to said contract and said certificate of acknowledgment was false.

Plaintiff did not discover that said certificate had been falsely made and attached to said contract until the occurrence of the events hereinafter set forth.

Said false certificate was attached to said contract under the following circumstances:

On or about said 23rd day of October, 1953, Defendant Barnes and a secretary employed by Huber & Goodwin, acting in the course and scope of her employment as such, procured said Murray to affix

said certificate of acknowledgment of signature of plaintiff to said contract. Said certificate was attached by said Murray to said contract in the course and scope of his employment by Defendants Huber & Goodwin.

VIII.

On many occasions during the years immediately prior to October 16, 1952, documents were prepared by Huber & Goodwin as attorneys for plaintiff which were signed by plaintiff in the offices of Huber & Goodwin and from time to time to some of said documents notarial certificates of acknowledgment were affixed. Plaintiff relied on Huber & Goodwin to comply with whatever conditions were necessary for the purpose of such certificates and to affix such certificates only when essential to the efficacy of the document concerned.

Said contract of October 16, 1952, was prepared by said Goodwin in his capacity as attorney for plaintiff. It is and at all times herein mentioned has been the recollection of plaintiff that said contract was signed by him in the offices of Huber & Goodwin.

On January 30, 1956, an action involving said contract of October 16, 1952, in which Bernard Kirsch was the plaintiff and said Huber & Goodwin and Barnes were defendants came on for trial in the United States District Court at Sacramento, California.

At said trial plaintiff testified that he had signed said contract in the offices of Huber & Goodwin in Eureka.

On February 1, 1956, said Goodwin testified that said contract was signed by plaintiff at plaintiff's place of business in Blue Lake, Humboldt County, which is approximately fourteen miles from Eureka, in the afternoon of October 16, 1952. Said Goodwin further testified that the only persons present were himself and Kirsch, and that Murray did not accompany him on said occasion. Goodwin further testified that he had no recollection of the acknowledgment of said contract by plaintiff, Barnes or himself.

On February 7, 1956, said Barnes testified in said action that he signed the contract on the morning of October 16, 1952, in the offices of Huber & Goodwin and that plaintiff was not present when he did so. Barnes further testified that on October 23, 1952, at the office of Huber & Goodwin in Eureka, California, Barnes and an employee of Huber & Goodwin in Eureka, California, procured said Murray to affix to said contract a notarial certificate of acknowledgment certifying that on said date Kirsch and Barnes acknowledged to Murray that they executed said contract.

On said February 8, 1956, pursuant to subpoena obtained by plaintiff, following the testimony of Goodwin on February 1, 1956, as aforesaid, said Murray appeared as a witness in said trial. He tes-

tified that he had no recollection of any acknowledgment by plaintiff of his execution of said contract, and further testified that he did not maintain a record of his notarial acts in accordance with Section 8206 of the Government Code of California.

IX.

Thereafter on September 11, 1953, said Barnes, without the knowledge or consent of plaintiff, recorded said contract in the official records of the Office of the Recorder of the County of Humboldt, and was able to and did thereby cause a cloud to be cast on plaintiff's title to the timber described in said contract, to the damage of plaintiff, as hereinafter set forth.

X.

At the time of said recordation, negotiations were pending for the sale by plaintiff to the State of California of a portion of the timber described in said contract for the price of \$287,500.00. On the 28th day of April, 1954, plaintiff deposited in escrow a grant deed conveying to the State of California the interest of plaintiff in said portion of the timber. On the 27th day of July, 1954, the State of California deposited in escrow warrants in the total sums of \$287,500.00, as the price of said timber and required as a condition precedent to the consummation of said transaction the issuance of a policy insuring the title of the State to said timber free and clear of encumbrances.

XI.

As a direct and proximate result of the false acknowledgement affixed to said contract of October 16, 1952, and the recordation thereof, a cloud was cast on plaintiff's title to said timber as aforesaid. No such policy of title insurance, required by the State of California as aforesaid, could be obtained and consequently it was impossible to consummate said sale until June 29, 1956, under the circumstances hereinafter set forth.

XII.

Upon ascertaining the facts hereinabove set forth, plaintiff made continuous and diligent efforts to procure the consummation of said sale to the State of California and in order to do so it was necessary for plaintiff to enter into an agreement providing for the withholding of the sum of \$80,000.00 for the account of said Barnes to provide for the payment of any claim which Barnes might thereafter establish for damages recovered against plaintiff under said contract, and the sum of \$45,000.00 for the account of Huber & Goodwin for similar purposes. Said agreement also provided for the removal from the title to said timber of the cloud created by the recordation of said contract by means of quitclaim deeds to the State of California. Plaintiff was unable to complete said transaction until June 29, 1956, and on said date said sale was consummated and the purchase price of said timber was paid, and of said purchase price the amounts hereinabove stated were withheld and are still withheld for the purposes above set forth.

XIII.

During the period of delay in the consummation of said sale plaintiff received no income from said timber. If plaintiff had received the purchase price on July 27, 1954, he could and would have invested the same and procured a substantial income therefrom.

As a direct and proximate result of said false acknowledgment and the recordation of said contract bearing said false acknowledgment, and the resulting delay in the consummation of the sale of said timber to the State of California, as set forth hereinabove, plaintiff has been damaged in that he has incurred liability for and has paid taxes on said timber which would not otherwise have been incurred, to wit:

Fiscal Year	Amount
July 1, 1954, to June 30, 1955.....	\$1,189.57
July 1, 1955, to June 30, 1956.....	1,977.03
Total	<hr/> \$3,166.60

and in addition thereto the Tax Collector of Humboldt County has made demand on plaintiff for taxes on a portion of said timber in the sum of \$501.74.

Wherefore, plaintiff prays judgment against defendants and each of them in the sum of \$38,936.00, with interest thereon from July 3, 1956, at the rate of 7% per annum; the sum of \$1,189.57, with interest thereon from July 28, 1955, at said rate;

the sum of \$1,977.03, with interest thereon from October 31, 1956, at said rate; the sum of \$501.74; together with costs of suit and such other and further relief as may be proper in the premises.

DAVID LIVINGSTON,
HAROLD R. FARROW,
JAMES R. MANSFIELD,

By /s/ DAVID LIVINGSTON,
Attorneys for Plaintiff.

EXHIBIT A

Agreement

This Agreement made this 16th day of October, 1952, by and between Bernard Kirsch (hereinafter referred to as Kirsch), as First Party, and George Barnes (hereinafter referred to as Barnes), as Second Party, and Huber & Goodwin as Third Party.

Witnesseth

Whereas, Kirsch is the owner of certain redwood, fir and spruce timber, situated north of Orick, Humboldt County, California, and generally known as the Prairie Creek timber, and desires to log the same; and

Whereas, Barnes is experienced in forestry and logging and is capable of causing the said timber to be logged; and

Whereas, Huber & Goodwin are able to prepare all agreements required, collect and disperse the forthcoming proceeds, and so forth; and

Whereas, the parties hereto desire by this agreement to define the respective rights and privileges each to the other:

It Is Now Therefore Agreed as Follows:

1. Kirsch agrees to permit the Prairie Creek timber aforesaid to be logged, commencing immediately, and as rapidly as good forestry practices and market conditions permit. Barnes shall be, and he is hereby designated the General Manager for the purpose of causing the said timber to be logged economically, including the logging, relogging, and making of split products thereon as economies permit. Barnes agrees to immediately enter upon his duties, take full charge of the operations and cause the premises to be logged, devoting all time reasonably necessary to conduct the operations necessary in accordance with the best logging practices and so as to effect the best recovery therefrom. In this regard, Barnes shall exercise his discretion in the employment of or contracting with loggers or logging subcontractors, truckers or any other men, machinery or equipment required to perform the services.

2. All logs developed from the property shall be delivered to such sawmill or other consumer as Barnes may from time to time select, at the maximum price which Barnes is able to obtain therefor.

Payment for all logs shall be made directly from the purchaser thereof to Huber & Goodwin, Attorneys at Law, 537 "G" Street, Eureka, California.

3. Huber & Goodwin agree to receive and collect all said funds, as Trustees, and to disperse the same according to the following plan:

(a) To promptly pay, when due, all logging costs and expenses pursuant to invoices submitted to the said Huber & Goodwin by the loggers, logging sub-contractors, truckers, etc., and which said invoices shall first be approved and authorized for payment by Barnes;

(b) To pay to Kirsch for all logs sold the sum of \$8.50 per M feet, payment to be on the basis of Humboldt log scale for redwood logs and Spaulding scale for fir and spruce logs;

(c) To repay to Kirsch any sums of money advanced by Kirsch from and after October 15, 1952, for tractor work, road work, or any other expenses assumed and paid by Kirsch in preparing the property for logging;

(d) In addition to the foregoing sums, to pay to Kirsch the sum of \$6.00 per M feet, Humboldt scale, for all felled, bucked, and peeled redwood or other logs now upon the aforesaid premises;

(e) All remaining sums, if any there be, shall be paid and distributed between the parties hereto by said Huber & Goodwin, as follows: (1) to Kirsch—37½% thereof; (ii) to Barnes—37½% thereof; and (iii) to Huber & Goodwin—25% thereof.

In this regard, the parties agree that they will at all times, and until the termination of this agreement, maintain with said Huber & Goodwin a reasonable balance of receipts over disbursements, so as to provide for unanticipated expenses. Huber & Goodwin agree that they will currently, during the life of this agreement, and not less frequently less than once a month, account to Kirsch and Barnes for all receipts and disbursements.

4. With reference to sub-section b of Section 3 hereof, wherein it is agreed that Kirsch shall be paid \$8.50 per M feet before making further distribution, the parties stipulate that said sum is not intended to represent the fair market value of said timber and that the fair market value of said timber as of the date hereof is agreed to be \$15.00 per M net scale. It is the intention of the parties that the participants herein shall share in the capital gain between said \$8.50 figure and said \$15.00 figure, as their interest may appear.

5. It is agreed that there is a period of removal of said timber, expiring on May 4, 1958, and Barnes agrees to so conduct the operation so that all merchantable timber will be removed from the premises before said date.

In Witness Whereof, the parties hereto have hereunto set their hands the day and year in this agreement first hereinabove written.

/s/ BERNARD KIRSCH,
First Party.

/s/ GEORGE BARNES,
Second Party.

HUBER & GOODWIN,
/s/ G. E. GOODWIN,
Third Party.

Acknowledgment—General

State of California,
County of Humboldt—ss.

On this 16th day of October, A.D. 1952, before me, Dayton D. Murray, Jr., a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared Bernard Kirsch and George Barnes, known to me to be the persons whose names are subscribed to the within Instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal] DAYTON D. MURRAY, JR.,
Notary Public in and for Said County and State
of California.

My Commission Expires July 26, 1955.

Partnership Acknowledgment

State of California,
County of Humboldt—ss.

On this 16th day of October in the year one thousand nine hundred and fifty-two, before me Dayton D. Murray, Jr., a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared G. E. Goodwin, known to me to be one of the partners of the partnership that executed the within instrument, and acknowledged to me that such partnership executed the same.

In Witness Whereof I have hereunto set my hand and affixed my official seal, in and for the said County and State, the day and year in this certificate first above written.

[Seal] DAYTON D. MURRAY, JR.,
Notary Public in and for the Said County and
State of California.

My Commission Expires July 26, 1955.

11449

Recorded at Request of

George Barnes.

Vol. 263 Official Records Pg. 336.

Sept 11, 8:40 a.m., '53.

Humboldt County Record.

Emma Cox Acala, Recorder.

Callan Parker, Deputy.

Fee \$2.50.

Mail to:

George Barnes,
3021 Fairfield,
Eureka, Calif.

Compared: Bernice Starr, Comparer.

[Endorsed]: Filed November 30, 1956.

[Title of District Court and Cause.]

MOTION TO DISMISS ACTION FOR FAIL-
URE TO STATE A CLAIM FOR WHICH
RELIEF CAN BE GRANTED

Comes now the Defendant George Barnes, and moves the court for its order dismissing the Complaint on file herein, and for its order awarding defendant attorney's fees and costs.

This motion is based upon the ground that said Complaint fails to state a claim upon which relief can be granted, and upon the further ground that it appears from the face of said Complaint that plaintiff's claim is barred by reason of the statute of limitations of the State of California.

Dated: This 16th day of January, 1957.

HILL & HILL,

By /s/ W. G. WATSON, JR.,

Attorneys for George Barnes.

[Title of District Court and Cause.]

NOTICE OF MOTION

To Bernard Kirsch, and to Messrs. David Livingston, Harold R. Farrow, James R. Mansfield,
His Attorneys

You, and Each of You, Will Please Take Notice and Are Hereby Notified that on the 4th day of February, 1957, at 10:00 o'clock a.m., of said day, or as soon thereafter as counsel can be heard by the above-entitled Court, located at the United States Post Office and Court House, Sacramento, California, defendant, George Barnes, will move the Court to dismiss the Complaint on file herein on the ground set forth in the Motion filed herewith, and for its order awarding defendant attorney's fees and costs.

Dated this 16th day of January, 1957.

HILL & HILL,

By /s/ W. G. WATSON, JR.,
Attorneys for Defendant,
George Barnes.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed January 16, 1957.

[Title of District Court and Cause.]

MOTION TO DISMISS ACTION FOR FAILURE TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED

Come now Defendants Milton L. Huber, G. Edward Goodwin, Milton L. Huber & G. Edward Goodwin, a copartnership, doing business as Huber & Goodwin, and move the court for its order dismissing the Complaint on file herein, and for its order awarding defendants attorney's fees and costs.

This motion is based upon the ground that said Complaint fails to state a claim upon which relief can be granted, and upon the further ground that it appears from the face of said Complaint that plaintiff's claim is barred by reason of the statute of limitations of the State of California.

Dated: This 16th day of January, 1957.

/s/ PHILIP C. WILKINS,
Attorney for Defendants Milton L. Huber and G.
Edward Goodwin.

[Title of District Court and Cause.]

NOTICE OF MOTION

To Bernard Kirsch, and to Messrs. David Livingston, Harold R. Farrow, James R. Mansfield,
His Attorneys

You, and Each of You, Will Please Take Notice and Are Hereby Notified that on the 4th day February, 1957, at 10:00 o'clock a.m. of said day, or as soon thereafter as counsel can be heard by the above-entitled court, located at the United States Post Office and Court House, Sacramento, California, Defendants Milton L. Huber, G. Edward Goodwin, Milton L. Huber & G. Edward Goodwin, a copartnership doing business as Huber & Goodwin, will move the court to dismiss the Complaint on file herein on the grounds set forth in the Motion filed herewith, and to award defendants attorney's fees and costs.

Dated: This 16th day of January, 1957.

/s/ PHILIP C. WILKINS,
Attorney for Defendants Milton L. Huber and G.
Edward Goodwin.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 16, 1957.

In the United States District Court for the
Northern District of California, Northern Division
Civil No. 7477

BERNARD KIRSCH,

Plaintiff,

vs.

GEORGE BARNES, MILTON L. HUBER, G.
EDWARD GOODWIN, MILTON L. HUBER
& G. EDWARD GOODWIN, a Copartnership,
Doing Business as HUBER & GOODWIN,

Defendants.

MEMORANDUM AND ORDER

Plaintiff, a citizen and resident of the State of New York, has filed in this Court a complaint, which he asserts states a cause of action for slander to title, against the defendants, citizens and residents of the State of California. There being proper allegations of jurisdictional amount, the action appears to be within the jurisdiction of this Court.

Defendants have each filed a motion to dismiss the complaint on the ground that the complaint fails to state a claim upon which relief can be granted. They, in essence, contend that facts necessary to ground a claim for slander to title have not been plead, and even if such facts were alleged, the action would be barred by the applicable (California) statute of limitations.¹

¹The statute of limitations as a defense is not pressed by the defendants, and in view of the conclusions reached herein, the Court has not deemed it necessary to reach this issue at this time.

It is a principal too well established to require the citation of much authority that a complaint should not be dismissed on the ground that it fails to state a cause of action "unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim" (2 Moore, Federal Practice, para. 12.08). This rule requires a close examination of the facts plead in the light most favorable to the pleader.

On October 16, 1952, plaintiff entered into a contract with defendants, whereby plaintiff, the owner of timber rights on a certain parcel of property, gave to defendant, Barnes, the right to log and sell the timber, in consideration of an agreed percentage of the timber sales proceeds. Under the contract, the law partnership of Huber & Goodwin became obligated to administer the funds derived from the contract and to handle all legal matters related thereto, in consideration of an agreed percentage of the timber sales proceeds. On October 23, 1952, Dayton C. Murray, Jr., a notary public in and for the County of Humboldt, State of California, employed in the offices of Huber & Goodwin, executed a notary's certificate of acknowledgment of the signatures of plaintiff and defendant, Barnes, and affixed the same to the contract.² The certificate of

²There is also attached to the instrument a separate notary's certificate of acknowledgment for the partnership of Huber & Goodwin, which is, as noted above, one of the parties to the agreement.

acknowledgment is alleged to be false, in that plaintiff was not present when it was prepared and executed. Plaintiff does not assert that the contract was in any way invalid or that he failed to affix his signature to the contract. Plaintiff merely alleges that defendant, Barnes, induced Murray to prepare and execute a notarial certificate of acknowledgment in plaintiff's absence, thereby rendering it false. Having procured the certificate of acknowledgment, Barnes thereafter, unbeknownst to plaintiff, on September 11, 1953, filed the contract of record. During this period, plaintiff was negotiating with the State of California for the sale of his timber rights, some of which formed the subject matter of the prior Barnes contract. On July 27, 1954, preliminary negotiations having been completed, plaintiff deposited in escrow a grant deed to the State of California, and the State of California deposited therein warrants in the amounts of \$287,500 pending the issuance of a policy of title insurance. Due to the recordation of the contract, and the acknowledgment (false as to the plaintiff), affixed thereto, no title policy could be obtained, and the sale by plaintiff to the State of California was delayed until June 29, 1956. Presumably, sometime between July 27, 1954, and June 29, 1956, plaintiff discovered the fact of recordation, and in an effort to consummate the ultimate sale to the State of California, procured alterations in the agreement with the State of California providing for the withholding of \$80,000 of the purchase price by the state in favor of Barnes, and \$45,000 in favor of Huber

& Goodwin. As a further provision of the altered agreement with the state, quitclaim deeds by the various parties to the Barnes contract were required to be made to the State of California. The completion date of the aforementioned transaction was June 29, 1956. Plaintiff contends that he suffered damage by virtue of the delay in consummating the sale to the State of California, which delay, he asserts, was directly and proximately caused by the placing of record of the Barnes contract, which recordation, plaintiff alleges, could not have taken place, but for the false notarial certificate of acknowledgment.³ Damages are listed as the additional taxes and assessments levied against plaintiff's property during the period of delay, and the loss of the earning capacity of the funds which would have been obtained for the sale had it been consummated in 1954, as originally contemplated.

In view of the record here, this case must be, and it will be, decided on the basis of the certificate of acknowledgment which plaintiff asserts is, as to him, false. For the purpose of the order to be made, this will be assumed to be a fact, and no consideration will be given to the other forms of acknowledgment attached to the contract.

³Plaintiff has not asserted that the Barnes certificate of acknowledgment or the Huber & Goodwin certificate of acknowledgment, or either of them is false, and no one has considered the effect of these certificates of acknowledgment, if in fact either one or both of them are legal and proper.

Certain fundamental rules relating to acknowledgments and recordation should be noted before proceeding to an examination of plaintiff's theory of his case. Under California law, an acknowledgment certified by a notary is a prerequisite to the recordation of the underlying instrument (Government Code, § 27286). A defectively acknowledged instrument, though not being entitled to record, and thus not capable of imparting constructive notice, is valid as between the parties to the instrument, and all those having actual notice of its existence (*Parkside Realty Co. vs. McDonald*, 166 Cal. 426, 431; *Kimbrow vs. Kimbro*, 199 Cal. 344, 349; and *Johndrow vs. Thomas*, 31 Cal. 2d 202, 206). It has been stated that, "the acknowledgment of a deed is not essential to its validity. The acknowledgment of a deed is merely evidentiary in character and is required only to entitle it to be recorded so as to render it competent evidence of the conveyance without further proof" (*Osterberg vs. Osterberg*, 68 Cal. App. 2d 254, 262. See also: *Williston vs. City of Yuba City*, 1 Cal. App. 2d 166, 171). Where a loss is sustained by reason of a false certificate of acknowledgment of a forged instrument the measure of damages recoverable for such official misconduct by the notary is determined by the evaluation of the rights which would have accrued to the injured party had the underlying instrument been valid (*Heidt vs. Minor*, 113 Cal. 385; facts set forth at 89 Cal. 115). The clear implication from this rule is that there could be no recovery against the notary or his surety for his official misconduct in ex-

ecuting a false acknowledgment where the underlying instrument is valid, for no measurable damages would result therefrom (See: § 8214, California Government Code).

In adopting the Restatement rule, the California Supreme Court in *Gudger vs. Manton*, 21 Cal. 2d 537, set forth the following definition of slander to title:

“One who, without a privilege to do so, publishes matter which is untrue and disparaging to another’s property in land, chattels or intangible things under such circumstances as would lead a reasonable man to foresee that the conduct of a third person as purchaser or lessee thereof might be determined thereby is liable for pecuniary loss resulting to the other from the impairment of vendibility thus caused.”
(At page 541, citing Rest. Torts, § 624.)

Dean Prosser sets forth five basic elements of the tort as the requirements that:

1. The falsehood must be communicated to a third person;
2. The publication and its disparaging innuendo must be plead and proven;
3. The falsity of the matter must be plead as part of the plaintiff’s cause of action;
4. The publication must have played a material and substantial part in inducing others not to deal with plaintiff; and

5. The plaintiff must have suffered special damage as a result.

(See: Prosser on Torts, 2d Ed., 1955, pp. 764, et. seq.) Aside from the question of privilege (e.g., See: *Albertson vs. Raboff*, 46 Cal. 2d 375), the gravaman of the action is the disparaging "innuendo" or "imputation" of matter that is without legal foundation and hence, false (*Gudger vs. Manton*, supra; *Phillips vs. Glazer*, 94 Cal. App. 2d 673, 677-8; cf.: *Kalajian vs. Nash*, 148 A.C.A. 523, 527-528; Rest. Torts, § 629).

Plaintiff contends that it was the untrue acknowledgment, and not the valid contract, which cast doubt on the plaintiff's title to the property, and thus caused the delay in the sale. Plaintiff must, of necessity, take this position for he had no legally protectible interest which could be disparaged by the publication of the Valid contract. Truth does not disparage (Restatement of Torts, § 634; cf.: *Phillips vs. Glazer*, supra). But in setting forth his claim in this fashion, plaintiff misconceives the role of a certificate of acknowledgment. It, by definition, bears no relation to legal interests in property, but serves only to lend to the document, to which it is affixed, the aura of authenticity. As such, the false certificate of acknowledgment, by itself, could impart no disparaging imputation or innuendo against plaintiff's interests in the timber. To conclude otherwise would be to indulge in a series of tenuous syllogisms unwarranted by the California law.

Furthermore, on the facts alleged by plaintiff, no legally protectible interest was lost by him as a result of defendant's activities. His rights against the defendants were no greater before the certificate of acknowledgment was drafted, or before the recordation of the contract, than they were after. That the defective recordation of the Barnes' contract hastened the discovery by plaintiff's prospective vendee of its existence, is of no aid to plaintiff; all that he lost as a result of such recordation was his power to conceal the existence of the Barnes' contract, which, so far as the record shows, was valid and binding as between the parties to it. This Court cannot see how under any such circumstances a "loss" could be compensible.

It is, Therefore, Ordered that plaintiff's complaint, and the cause of action sought to be set forth therein, be, and the same are, hereby dismissed. Defendants will prepare and lodge with the Clerk of this Court all papers and documents necessary for the final disposition of this matter.

Dated: June 24, 1957.

/s/ SHERILL HALBERT,
United States District Judge.

[Endorsed]: Filed June 24, 1957.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR LEAVE TO
FILE AMENDED COMPLAINT

To: Defendant George Barnes, and to Messrs. Hill & Hill, His Attorneys; and

To: Defendants Milton L. Huber, G. Edward Goodwin, Milton L. Huber & G. Edward Goodwin, a Copartnership, Doing Business as Huber & Goodwin, and to Philip C. Wilkins, Esq., Their Attorney:

Please Take Notice that on Monday, the 22nd day of July, 1957, at the hour of 10 o'clock a.m. of said day or as soon thereafter as counsel can be heard, in the courtroom of the above-entitled court located at the United State Post Office and Courthouse Building, Sacramento, California, plaintiff will move the above-entitled court for leave to file herein an amended complaint, in the form of the amended complaint on file in the office of the Clerk of the above-entitled court, a copy of which amended complaint was on said date mailed to Messrs. Hill & Hill, attorneys for Defendant George Barnes herein, and to Philip C. Wilkins, Esq., attorney for Defendants Milton L. Huber, G. Edward Goodwin, Milton L. Huber & G. Edward Goodwin, a copartnership, doing business as Huber & Goodwin, herein.

Said motion will be based upon the ground that said amended complaint states a cause of action

against defendants herein, and that the filing of said amended complaint will be in the furtherance of justice. Said motion will be based upon this notice of motion, the Memorandum of Authorities in support thereof attached hereto, said amended complaint heretofore lodged with the Clerk of the above-entitled Court, and the Memordandum of Points and Authorities heretofore filed herein by plaintiff.

Plaintiff hereby requests leave to submit the above-described motion without oral argument and without appearing at the time and place hereinabove specified.

Dated: July 9, 1957.

DAVID LIVINGSTON, et al.,

By /s/ DAVID LIVINGSTON,
Attorneys for Plaintiff.

Memorandum of Authorities

Kelly v. Delaware River Joint Commission, 187 Fed. 2d 93 (Ct. of Ap., 3d Cir.):

Syl. 2. Motion to dismiss complaint is not a "responsive pleading" within federal rule permitting party to amend once as a matter of course at any time before "responsive pleading" is served. Fed. Rules Civ. Proc. Rule 15 (a), 28 U.S.C.A.

Russo v. Sofia Bros., 2 Fed. Rules Dec., 80 (Dist. Ct., S.D.N.Y.):

Syl. 6. Where district judge's memorandum granting codefendant's motion to dismiss complaint as to codefendant for failure to state a cause of action contained no reference to plaintiff's right to plead over, and there had been no trial of issues, and judge signed codefendant's order of dismissal which made no reference to amendment, the judge's action was to be construed as denying a general leave to amend but not as denying plaintiff the privilege of proceeding on proper papers to seek District Court's permission to serve a specific amendment. Federal Rules of Civil Procedure, rules 1, 15(a), 41, 28 U.S.C.A. following section 723c.

Sidebotham v. Robison, 216 Fed. 2d 816 (Ct. of Ap. 9th Cir.):

Syl. 13. In view of means afforded a defendant by Federal Civil Procedure Rules to obtain speedy disposition of a plaintiff's claim without foundation or substance, either by securing more definite statement or bill of particulars and thereafter applying for judgment on pleadings or by moving for summary judgment, dismissal of complaint for insufficiency of statement is not justified, unless it appears to a certainty that plaintiff would be entitled to no relief under any state of facts which could be proved in support of claim. Fed. Rules Civ. Proc. rules 12(e), (h) (1), 56, 28 U.S.C.A.

Certificate of Service attached.

[Endorsed]: Filed July 10, 1957.

[Title of District Court and Cause.]

AMENDED COMPLAINT FOR MONEY

Comes now plaintiff and files this, his amended complaint against defendants and alleges:

I.

At the time of the filing of the complaint herein plaintiff was and at all times herein mentioned has been and still is a resident of the State of New York.

II.

At the time of the filing of the complaint herein defendants were and at all times herein mentioned have been citizens and residents of the State of California, and of the Northern Division of the Northern District thereof.

III.

This is an action by citizens of different states, viz., the plaintiff on one side and the defendants on the other side, and the amount in controversy is in excess of Ten Thousand Dollars (\$10,000.00).

IV.

Milton L. Huber and G. Edward Goodwin are now and at all times herein mentioned have been attorneys and copartners doing business as Huber & Goodwin. During several years up to and including October 16, 1952, Huber & Goodwin were the regularly retained and employed attorneys for plaintiff.

V.

Dayton C. Murray, Jr., hereinafter called Murray, was on July 26, 1951, duly appointed a Notary Public in and for the County of Humboldt, State of California, for the term of four (4) years from the date of said commission and was until the termination of said commission a duly acting and appointed Notary Public. Said Dayton G. Murray, Jr., is now and at all times herein mentioned has been an attorney at law, employed by Defendants Huber & Goodwin.

For several years prior to October 16, 1952, Defendant Barnes had acted in a confidential capacity for plaintiff and procured sales of real property belonging to plaintiff and located in the same vicinity as the timber hereinafter mentioned, and in said transactions Huber & Goodwin had participated in their capacity as attorneys for plaintiff and shared with Barnes in the compensation paid by plaintiff for said services. Prior to October 16, 1952, Barnes had also sought to procure purchasers for the timber mentioned and Huber & Goodwin had participated therein.

VI.

At all times mentioned herein and until the 29th day of June, 1956, plaintiff herein was the owner of certain timber located in the County of Humboldt, State of California.

VII.

On October 16, 1952, Huber & Goodwin, in their capacity as attorneys for plaintiff, prepared and

procured plaintiff's signature to a contract, a copy of which together with the certificate of acknowledgment hereinafter mentioned is attached to the complaint herein, marked Exhibit A and made a part hereof. The timber described in said contract is that mentioned in paragraph III above and was the property of plaintiff and no person other than plaintiff had any right, title or interest therein.

Plaintiff did not acknowledge execution of said contract. Notwithstanding that fact and for the purpose and with the intent of qualifying said contract for recordation as a transaction on the part of plaintiff and thereby producing an apparent encumbrance against plaintiff's title to said timber and placing an obstacle in the way of any transaction on the part of plaintiff with respect to said timber, such as that hereinafter set forth, defendants collaborated with said Murray in order to and did, without the knowledge or consent of plaintiff, procure said Murray, in his capacity as a Notary Public and employee of Huber & Goodwin, and said Murray did in his said capacity and at the instance of defendants wrongfully sign and seal a certificate of acknowledgment of the execution by plaintiff of said contract and affix said certificate to said contract. Said certificate of acknowledgment bore the date of October 16, 1952.

Defendants concealed from plaintiff and plaintiff did not know or discover that said certificate had been falsely made and attached to said contract

until the occurrence of the events in February, 1956, hereinafter set forth.

VIII.

On many occasions during the years immediately prior to October 16, 1952, documents were prepared by Huber & Goodwin as attorneys for plaintiff which were signed by plaintiff in the offices of Huber & Goodwin and from time to time said Huber & Goodwin procured the attachment of notarial certificates of acknowledgment to those documents executed by plaintiff which constituted a conveyance of or creation of a lien or encumbrance upon title to the property. Plaintiff relied on Huber & Goodwin to comply with whatever conditions were necessary for the purpose of such certificates and to affix such certificates only when essential to the efficacy of the document concerned.

Said contract of October 16, 1952, was prepared by said Goodwin in his capacity as attorney for plaintiff. It is and at all times herein mentioned has been the recollection of plaintiff that said contract was signed by him in the offices of Huber & Goodwin.

On January 30, 1956, an action involving said contract of October 16, 1952, in which Bernard Kirsch was the plaintiff and said Huber & Goodwin and Barnes were defendants came on for trial in the United States District Court at Sacramento, California.

At said trial plaintiff testified that he had signed said contract in the offices of Huber & Goodwin in Eureka.

On February 1, 1956, said Goodwin testified that said contract was signed by plaintiff at plaintiff's place of business in Blue Lake, Humboldt County, which is approximately fourteen miles from Eureka, in the afternoon of October 16, 1952. Said Goodwin further testified that the only persons present were himself and Kirsch, and that Murray did not accompany him on said occasion. Goodwin further testified that he had no recollection of the acknowledgment of said contract by plaintiff, Barnes or himself.

On February 7, 1956, said Barnes testified in said action that he signed the contract on the morning of October 16, 1952, in the offices of Huber & Goodwin and that plaintiff was not present when he did so. Barnes further testified that on October 23, 1952, at the office of Huber & Goodwin in Eureka, California, Barnes and an employee of Huber & Goodwin in Eureka, California, procured said Murray to affix to said contract a notarial certificate of acknowledgment certifying that on said date Kirsch and Barnes acknowledged to Murray that they executed said contract.

On said February 8, 1956, pursuant to subpoena obtained by plaintiff, following the testimony of Goodwin on February 1, 1956, as aforesaid, said Murray appeared as a witness in said trial. He

testified that he had no recollection of any acknowledgment by plaintiff of his execution of said contract, and further testified that he did not maintain a record of his notarial acts in accordance with Section 8206 of the Government Code of California.

IX.

On September 11, 1953, negotiations were pending between plaintiff and the State of California for the sale of a portion of said timber to the State. Defendants had knowledge of said negotiations and participated therein. At the time of the execution of said contract on October 16, 1952, defendants had knowledge of the interest of the State in acquiring said timber and of the likelihood that such interest on the part of the State would eventually lead to an offer to purchase said timber.

On September 11, 1953, for the purpose of carrying out the plan devised as aforesaid at the time of the procurement of said false certificate of acknowledgment, of placing on record an apparent encumbrance on the title of plaintiff to said timber, of causing the title insurance company from which insurance on the title to said timber would be required by the State as a condition to the consummation of such sale, to refuse to take the risk as to the effect of said contract of record upon the title of plaintiff, and of preventing the consummation of said sale, said Barnes, without the knowledge or consent of plaintiff, recorded said contract in the official records of the office of the Recorder of the County of Humboldt, to the damage of plaintiff,

as hereinafter set forth. If said certificate of acknowledgment by plaintiff of execution of said contract had not been attached thereto, said Recorder would have refused to record said contract.

Said recordation was concealed from plaintiff and plaintiff proceeded with the negotiations for said sale and in due course deposited in escrow a grant deed conveying the title of plaintiff in said portion of said timber to the State of California and the State of California deposited in escrow its warrants for the purchase price thereof.

X.

As a condition precedent to the consummation of said sale, the State of California required a policy insuring the title of the State to said timber, free and clear of encumbrances. But as the direct and proximate result of said false acknowledgment and recordation of said contract and because of the apparent encumbrance against plaintiff's title to said timber caused thereby, and because the recordation of said contract gave the appearance to said contract of the creation of an interest in defendants to said timber, no policy of title insurance could be obtained, and consequently it was impossible to consummate said sale until June 29, 1956, under the circumstances hereinafter set forth.

Notwithstanding the recordation of said contract, if there had not been attached thereto a certificate of acknowledgment of execution by plaintiff of execution thereof, the title insurance company

would have disregarded said contract and would have issued a policy insuring the record title of said timber as free and clear of any encumbrance insofar as said contract was concerned.

XI.

Upon ascertaining that the State of California refused to consummate said sale for the reasons above stated, plaintiff made continuous and diligent efforts to procure such consummation and in order to do so plaintiff was compelled to enter into an agreement providing for the withholding of the sum of \$80,000.00 for the account of Barnes to provide for the payment of any claim which Barnes might thereafter establish for damages to be recovered against plaintiff because of the alleged violation by plaintiff of said contract, and the sum of \$45,000.00 for the account of Huber & Goodwin for similar purposes. Said agreement also provided for the removal from the title to said timber of the apparent encumbrance created by the recordation of said contract by means of quit claim deeds from defendants to the State of California. Despite plaintiff's efforts to complete said transaction at the earliest possible time as above alleged, plaintiff was unable to do so until June 29, 1956, and on said date said sale was consummated and the purchase price, to wit, \$249,421.28, was paid, and of said purchase price the amounts hereinabove stated were withheld and are still withheld for the purposes set forth.

XII.

During the period of delay in the consummation of said sale plaintiff received no income from said timber. If Plaintiff had received the purchase price on July 27, 1954, he could and would have invested the same and procured a substantial income therefrom. As a direct and proximate result of said false acknowledgment and the recordation of said contract bearing said false acknowledgment, and the resulting delay in the consummation of the sale of said timber to the State of California, as set forth hereinabove, plaintiff has been damaged in that he has been deprived of the amount of the purchase price of said timber from July 27, 1954, to June 29, 1956, and has been deprived of the income which he would have derived from the investment thereof.

As a direct and proximate result of said false acknowledgment and the recordation of said contract bearing said false acknowledgment, and the resulting delay in the consummation of the sale of said timber to the State of California, as set forth hereinabove, plaintiff has been damaged in that he has incurred liability for and has paid taxes on said timber which would not otherwise have been incurred, to wit:

Fiscal Year	Amount
July 1, 1954, to June 30, 1955.....	\$1,189.57
July 1, 1955, to June 30, 1956.....	1,977.03
Total	<hr/> \$3,166.60

and in addition thereto the Tax Collector of Humboldt County has made demand on plaintiff for taxes on a portion of said timber in the sum of \$501.74.

Wherefore, plaintiff prays judgment against defendants and each of them in the sum of \$38,936.00, with interest thereon from July 3, 1956, at the rate of 7% per annum; the sum of \$1,189.57, with interest thereon from July 28, 1955, at said rate; the sum of \$1,977.03, with interest thereon from October 31, 1956, at said rate; the sum of \$501.74; together with costs of suit and such other and further relief as may be proper in the premises.

DAVID LIVINGSTON,
HAROLD R. FARROW,
JAMES R. MANSFIELD,

By /s/ DAVID LIVINGSTON,
Attorneys for Plaintiff.

[Endorsed]: Lodged July 5, 1957.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

This Court by its Memorandum and Order of June 24, 1957 (153 F. Supp. 260), dismissed plaintiff's original complaint and the cause of action sought to be set forth therein. Plaintiff has now filed a motion seeking permission to file an amended complaint in this action.

The facts, which the original complaint alleged to exist, are set forth at length in this Court's earlier Memorandum and Order. The complaint now sought to be filed contains no allegations which materially affect the factual composition as previously set forth. Only the emphasis is shifted. Specifically, the same logging contract, the same parties, the same acts, and the same consequences are involved. Plaintiff's theory of his case has been more clearly defined, however, and, because of that improvement, both the proposed amended complaint and the theory warrant careful analysis.

Preliminarily, there must be a disposition of certain procedural assertions of plaintiff. First, it is not the law that a party may amend his complaint as a matter of right under Rule 15(a), Federal Rules of Civil Procedure, after the Court has entered an order dismissing the original complaint and the cause of action sought to be set forth in it, and this is true even though the "motion to dismiss" is not properly denominated a "responsive pleading" (See: *Kelly vs. Delaware River Joint Commission*, 187 F. 2d 93, 94 [3rd Cir.]). On the Contrary, the Court is given a large measure of discretion under such circumstances, and leave to file an amended complaint should not properly be granted unless new facts are made to appear which would remedy the defects contained in the previous complaint (*Ginsberg vs. Stern*, 19 F. R. D. 238, 241 [W. D. Pa.]; and cf.: *Sidebotham vs. Robinson*, 216 F. 2d 816, 826 [9th Cir.]). The duty of the

Court on this motion, then, is to determine whether the proposed amended complaint states a cause of action, and thus, is entitled to filing.

Plaintiff has once again attempted to bring himself within the rule of *Gudger vs. Manton*, 21 Cal. 2d. 537. In that case it was held that the unjustified levy on a husband's separate property of an execution, issued as the result of a judgment obtained against his wife, constituted a disparagement of the husband's title, even though the underlying judgment was valid. Plaintiff here asserts that, even though the underlying contract between defendants and himself was valid, and therefore did not slander his title, the recordation of that contract created the false imputation or innuendo that the contract affected plaintiff's title to the timber. At the heart of plaintiff's theory in this connection is his contention that the recordation could not have been accomplished but for the false notarial certificate of acknowledgment.

As noted in this Court's previous opinion, no cause of action can be based on the falsity of the notarial certificate alone unless the underlying instrument itself is invalid for some reason (153 F. Supp. at 263). The distinction between the instant case and the case of *Greeninger vs. New Amsterdam Casualty Co.*, 152 A.C.A. 686, which plaintiff asserts controls the case at bar, is that in *Greeninger* the underlying instrument to which the notarial certificate was affixed was procured by fraud, whereas, in the instant case, no assertion has ever been made

that there is any doubt as to the validity of the underlying contract between plaintiff and defendants.

Hence, plaintiff's motion must stand or fall on whether the implication arising from the recollection of the contract that the contract affected plaintiff's title to the timber was an imputation or innuendo lacking in legal foundation so as to be actionable under the California law (See this Court's discussion of this requirement in 153 F. Supp. 263, at 264). The resolution of this issue depends upon the legal nature of the contract involved in this litigation, which is a question of law, and one which would have to be determined by the Court, either now or at some future point in the proceedings. Nothing will be gained by delay, so the issue may as well be resolved at this time.

Under the terms of this contract (a copy of which is appended to plaintiff's original complaint as Exhibit "A"), defendant Barnes was given the right to log, cut and market all of the "Prairie Creek" timber which was owned by plaintiff. Barnes was given, in short, complete control over the logging operations. Defendants, Huber & Goodwin, individually, and as a co-partnership, were required to handle the receipts and disbursements of funds arising from the transaction, and to give monthly accountings thereof. Plaintiff received a stipulated price per board foot of timber taken, and in addition, a certain specific percentage of the net proceeds of the operation. Each of the other parties

to the contract received a specific percentage of the net proceeds of the operation. The expiration date of the contract was set as May 4, 1958.

This contract was unquestionably one in which the right to cut, remove and market timber was transferred, which is in the nature of a contract for the sale of goods (*Ascherman vs. McKee*, 143 C. A. 2d 277, 282-3; *Palmer vs. Wahler*, 133 C. A. 2d 705, 711, 712). The right to remove timber under such a contract is characterized as a chattel real within the meaning of §765 of the California Civil Code, that is, an interest akin to a term for years (*Palmer vs. Wahler*, *supra*; and cf. *Dabney vs. Edwards*, 5 Cal. 2d 1, 6-11). A chattel real under §765 of the California Civil Code, even though characterized as a personal property right, by itself, nevertheless is considered an estate or interest in the particular property it affects within §761 of the California Civil Code (*German-American Savings Bank vs. Gollmer*, 155 Cal. 683, 686, 687). As such, it unquestionably affects the title to, or the possession of, real property within the meaning of §27280 of the California Government Code, and, thus, is entitled to recordation.

Furthermore, it has been specifically held that the recordation of a contract involving the right to remove timber within a specified period of time is not only proper, but will serve to constitute constructive notice to subsequent purchasers (*Mallett vs. Doherty*, 180 Cal. 225, 229). The Court is, therefore, of the view that since contracts such as that

which is here involved do affect the title to the land and the timber standing thereon, no false innuendo or imputation arose from the fact of recordation, even though the recordation itself may have been, or actually was, technically improper. Without such a false innuendo or imputation, the plaintiff's claim remains within the scope of the decision announced by this Court on June 24, 1957 (153 F. Supp. 260).

Under the rules, which have been set forth by this Court, in its previous Memorandum and in this Memorandum, the plaintiff failed to state a cause of action against the defendants in his initial complaint. Now, after careful study and reflection upon the subject, the Court is of the view that plaintiff simply cannot get himself over the legal barrier, which the facts asserted by plaintiff himself, have placed in front of him. This conclusion has been reached after examining and accepting as true, for the purposes of these proceedings, the allegations set forth in the Amended Complaint for Money, which plaintiff, by the instant motion, seeks to file in this action.

It Is, Therefore, Ordered that plaintiff's motion for leave to file his Amended Complaint for Money in this action be, and the same is, hereby denied.

Dated: December 18, 1957.

/s/ SHERRILL HALBERT,
United States District Judge.

[Endorsed]: Filed December 18, 1957.

[Title of District Court and Cause.]

Notice of Appeal to Court of Appeals

Notice Is Hereby Given that Bernard Kirsch, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order denying plaintiff's motion for leave to file an amended complaint herein entered in this action on December 18, 1957, and from the Order dismissing complaint entered in this action on June 24, 1957.

Dated this 30th day of December, 1957.

DAVID LIVINGSTON,
HAROLD R. FARROW,
JAMES R. MANSFIELD,

By /s/ DAVID LIVINGSTON.

[Endorsed]: Filed December 31, 1957.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH
PLAINTIFF AND APPELLANT INTENDS
TO RELY ON THE APPEAL

Appellant has designated the complete record and proceedings to be contained in the record on appeal, and this statement of points which is required by rule 75 (d) only in the event that appellant does not designate for inclusion the complete record and all the proceedings and evidence in the

action is not intended as an indication that appellant does not desire the complete record and proceedings to be contained in the record on appeal. The points on which plaintiff and appellant intends to rely on appeal are as follows:

1. The District Court erred in granting defendants' motions to dismiss the complaint and in making its order dismissing the complaint dated June 24, 1957.

2. Said court erred in holding that plaintiff's complaint did not state a claim upon which relief could be granted.

3. Said court erred in denying plaintiff's motion for leave to file an amended complaint and in making its order denying said motion, dated December 18, 1957.

4. Said court erred in holding that plaintiff's amended complaint did not state a claim upon which relief could be granted.

Dated: January 2, 1958.

DAVID LIVINGSTON, et al.,

By /s/ DAVID LIVINGSTON,

Attorneys for Plaintiff.

Certificate of Service attached.

[Endorsed]: Filed January 3, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the record on appeal herein as designated by the parties.

Complaint.

Motion to dismiss as to Deft. Barnes.

Motion to dismiss as to Defts Huber & Goodwin.

Memorandum & order.

Notice of motion for leave to file amended complaint.

Proposed amended complaint.

Memorandum & order.

Notice of appeal.

Cost bond on appeal.

Statement of points on which plaintiff intends to rely on appeal.

Appellant's designation of the record on appeal.

Order extending time to docket appeal.

In Witness Whereof, I have hereunto set my hand and the seal of said Court this 13th day of February, 1958.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ C. C. EVENSEN,
Deputy Clerk.

[Endorsed]: No. 15891. United States Court of Appeals for the Ninth Circuit. Bernard Kirsch, Appellant, vs. George Barnes, Milton L. Huber, G. Edward Goodwin, Milton L. Huber & G. Edward Goodwin, a Copartnership Doing Business as Huber & Goodwin, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed: February 14, 1958.

Docketed: February 19, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.